IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM. D. S. MAJANJA J.

CRIMINAL APPEAL NO. 11 OF 2019

BETWEEN

MAXWELL MILIMO MILDOW .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal against the original conviction and sentence dated 15th June 2017 in Criminal Case No. 2576 of 2015 at the Magistrates Court in Thika before Hon. C.A. Otieno-Omondi, PM)

JUDGMENT

1. The appellant, **MAXWELL MILIMO MILDOW**, was charged and convicted of the offence of rape contrary to **section 3(1)(a)(b)** and **(3)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars of the charge were that on 14th June 2015 in Thika Township, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of GNK without her consent.

2. The main issue in this appeal is whether the appellant was identified as the person who committed the act of rape. As this is a first appeal, the duty of this court is to evaluate the evidence and reach an independent decision as to whether to uphold the conviction and sentence bearing in mind that it neither heard or saw the witnesses testify. In order to proceed with this task it is necessary to outline the evidence that emerged at the trial.

3. The complaint, PW 1, gave a detailed testimony that on 14th June 2016 at 9.00pm, she took a motorbike to see her friends at Makongeni. Instead of taking her to her destination, the motorbike rider took her to a thicket, ordered her to alight while threatening to strangle her. He pushed her to the ground, stepped on her neck, tore her trousers, opened his zip and proceeded to insert his penis into her vagina. PW 1 testified that at the material time, the motorbike lights were on so she was able to recall the registration number as **K**D 1**L**. She also recalled that the motorbike had red and blue marks. The assailant took her phone. After the ordeal the assailant took her to the nearby petrol station, demanded Kshs. 50/-. She gave him Kshs. 200/- and he returned change and sped off. Thereafter, she hailed a lady who was driving past. She assisted took her to Thika Level 5 Hospital where she was examined and treated.

4. PW 1 also reported the incident to the police station where she described the assailant and gave the details of the motorbike. She was later informed that a suspect had been arrested. She attended an Identification (ID) parade where she identified the appellant as the person who raped her. She also identified the motorbike which was produced in court as an exhibit.

5. PW 2, a businessman and a member of the local Community Policing, told the court that he had been requested by the police to trace a motorbike registration **K**D 1**L** which had been used for the crime. He narrated how he and members of the Community Policing went out to search for it. On 16th June 2016, they managed to locate it not only from the registration number but also from the American flag colours on the petrol tank. They also saw a short dark person, fitting the description they had been given, leaning on the motorbike. They called the police officers who came and arrested the suspect.

6. The medical evidence comprising the P3 medical form and the Post Rape Care (PRC) form, laboratory request form and treatment notes were produced by a medical doctor, PW 4, who testified on behalf of his colleague who had examined PW 1 on 4th August 2015. The key observations by the examining doctor were that PW 1 had a bruise on the left finger which he concluded was caused by a blunt object. The genitalia showed a reddish vulva and although the hymen was broken, he noted that it may have been broken earlier. According to the PRC form, when PW 1 arrived at the hospital she appeared shaken. Her coat had leaves on it and her blouse and blue jeans were torn. The vaginal swab showed epithelial cells. The doctor concluded that the redness around the vulva was indicative of trauma consistent with rape.

7. The Investigating officer, PW 3, told the court that she was detailed to investigate the matter on 15th June 2016. She called PW 1 who narrated to her what had taken place. She issued her with a P3 form to be filled at the hospital. She informed the court that after the appellant was arrested, he was identified by PW 1 at an identification parade carried out by an Inspector of police.

8. When put on his defence, the appellant gave an unsworn statement in which he denied the charge against him. He told the court that he was a resident of Kiganjo in Thika. On 12th June 2016. He travelled to his home up country and arrived there on 13th June 2016. He came back to Thika on 16th June 2016 whereupon he was arrested while he was working as a hawker. The appellant told the court that he found PW 1 in the interrogation room prior to the ID parade and when the called to identify the suspect, she was unable to identify anyone.

9. Based on the evidence I have outlined, the trial magistrate was satisfied that the appellant had committed an act of rape. Under **section 3(1)** of the ***Act***, the offence of rape is established if:

> *a. The accused intentionally and unlawfully commits an act which causes penetration of the victim's genital organs,*
>
> *b. The other person does not consent or,*
>
> *c. The consent is obtained by force or by means of threats or intimidation of any kind.*

10. The testimony of PW 1 was clear and concise as to what took place on the material night. It is clear that the act of penetration was not voluntary. It was accompanied by threats of violence and intimidation and it was indeed forceful. Although her testimony was not required to be corroborated under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya***), there was sufficient corroborative evidence from the medical evidence produced by PW 4. The PRC form, which was filled on the night of the incident, showed the state of her clothes which were torn, her state of distress after the ordeal and the trauma inflicted on her vagina all pointing to an act of rape. I find and hold that PW 1 was raped.

11. As I stated earlier, the issue in this appeal is whether the appellant was identified. The assailant was a stranger and the incident took place at night in circumstances that call for caution in order to avoid a case of mistaken identity. In a line of decisions; ***Maitanyi v Republic*** **[1986] 2 KLR 75*, Karanja & Another v Republic*** **[2004]2 KLR 140** and ***Wanjohi & Others v Republic*** **[1989] KLR 415** and ***Tom Peimo Ombura & Another v Republic*** **NAI CA Civil Appeal No. 98 of 1992 (UR)** among others, the Court of Appeal has held that the court must examine all facts and weigh the evidence in order to determine whether the identification is free from error. In ***Wamunga v Republic*** **[1989] KLR 424**, the Court of Appeal observed that:

> *It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.*

12. PW 1 testified that though it was at night, the motorbike parking light was on and she was able to see the assailant. The incident took quite some time and the parties were in close proximity. Further, after committing the felonious act, the appellant took her to the nearby petrol station where the parties also interacted while she was paying the fare. All these facts taken together provide circumstances which I find were favourable for positive identification.

13. In assessing the evidence of identification, the court ought to take into account the fact that a witness who identified an appellant would be able to give the police a description of the assailant (see ***Simiyu and Another v Republic*** **[2005] 1 KLR 192)**. In this case, the appellant not only described the assailant to the police but also gave the police the registration number of the motorbike. The police were then able to look for the motorbike and arrest a suspect who fitted the description of the accused. It is on the basis of this description that an identification parade was conducted to test the veracity and correctness of witness description of a suspect. If an ID parade is not done in such circumstance, the identification amounts to a dock identification which as the Court of Appeal observed in ***Gabriel Kamau Njoroge v Republic [1982-1988] 1 KAR 1134*** *was, "generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade". [Emphasis mine].*

14. On the same issue, the Court of Appeal in ***James Tinega Omwenga v Republic*** **NKU CA Criminal Appeal No. 143 of 2011[2014] eKLR** *expressed the view that:*

> *The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless. [Emphasis mine]*

15. The reason I have underlined a properly conducted parade is that in this case, the officer who conducted the ID parade was not called to give evidence on how the parade was conducted and indeed produce the ID parade forms. The trial magistrate noted that in his defence the appellant suggested that before the parade, he was led to the investigation office where he found the police officer and a woman who would later pick him. Of this suggestion, the trial magistrate held that:

> *I note that he did not raise this issue during cross-examination of the complaint or to the officer who conducted the identification (parade) as the accused person indicated in (identification parade form) that he was so satisfied with the manner in which the parade had been conducted…. the irregularity in the identification raised by the accused is …… an afterthought only meant to hoodwink the court.*

16. This was a misdirection, as the officer who conducted the parade was never called as a witness and there was no basis upon which the appellant's contention could be tested. In ***Ibrahim Agevi Kigame and Another v Republic*** **ELD CA Criminal Appeal No.289 of 2009 [2011] eKLR**, the Court of Appeal had this to say about the failure to call the officer who conducted the ID parade:

> *Looking at the record, many aspects of the evidence on these parades could only be answered by the officer who conducted the*

parades and the parade forms. Thus that officer was a necessary witness for the prosecution in the entire case, for without him and the forms it could not be established as to whether the identification parades were fairly conducted. He was a witness that the prosecution needed to establish their case on identification beyond reasonable doubt. He was not called; with the consequence, that in our view, the evidence establishing identification of the appellants was not before the court……..

We, with respect do not share the view of the superior court that the identification of the appellants was otherwise than mere dock identification. In the absence of the officer who conducted the identification parade and the parade forms, nothing remained before court other than dock identification which is worthless. Conviction could not therefore proceed on that evidence alone.

17. The same position was taken by the Court of Appeal in ***Achieng* v *Republic* [1981] KLR 175 where it observed as follows**:

[W]here an identification parade was held, the officer who conducted it must be questioned about it. Where such an officer is not questioned the evidence of identification can still be accepted as reliable if there is other evidence such as the finding of goods in possession of the *appellant.*

18. It is not in all cases that a dock identification is fatal, even in the absence of the evidence of an ID parade, the court must examine and test, with greatest care, the evidence presented before convicting an accused as was observed by the Court of Appeal in ***Muiruri and 2 Others v Republic* [2002] KLR 274** where it was held that:

We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identity.

19. What then is the other evidence? The appellant was found leaning on the motorbike whose registration number fitted that which PW 1 had given. The prosecution did not establish the relationship of the appellant with the motorbike. Was he the owner? Was he employed by the owner? In other words, what was the appellant's relationship to the motorbike prior to that date of the incident? In the absence of positive identification, this fact that the appellant was *"leaning on the motorcycle"* of itself could not take the prosecution very far.

20. In light of the reasons I have given, the appellant's conviction is unsafe. I have no option but to allow the appeal. The conviction and sentence are quashed. The appellant is set free unless otherwise lawfully held on a separate warrant.

DATED and DELIVERED at KIAMBU this 8th day of JANUARY 2020.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.